

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JCC

**STIPULATED MOTION AND
[PROPOSED] ORDER CONCERNING
EXPERT DISCOVERY**

NOTE ON MOTION CALENDAR:
September 19, 2022

STIPULATED MOTION AND [PROPOSED] ORDER
CONCERNING EXPERT DISCOVERY
CASE No. 2:21-cv-00563-JCC

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1 The parties¹ in the above-captioned action, through their respective counsel of record,
 2 stipulate to the following regarding the scope of expert reports and discovery in the above-
 3 captioned action and all other matters subsequently consolidated with them (collectively, the
 4 “Actions”), subject to approval by the Court.

5 1. This Stipulation Concerning Expert Discovery (“Stipulation”) does not set or alter
 6 the time for any disclosure required by Federal Rule of Civil Procedure 26(a)(2)(B) or the timing
 7 of any deadlines set forth in any operative scheduling orders entered in this case.

8 2. To the extent that this Stipulation imposes limitations on discovery that would
 9 otherwise be available under the Federal Rules of Civil Procedure or this Court’s standing orders,
 10 the parties have agreed to those limitations to increase the efficiency of their dealings with
 11 testifying experts and to minimize discovery disputes regarding testifying experts. Neither the
 12 terms of this Stipulation nor the parties’ agreement to them shall be considered an admission by
 13 any party that any of the information restricted from discovery by this Stipulation would otherwise
 14 be discoverable or admissible.

15 3. The parties agree to modify their Rule 26(a)(2)(B)(ii) disclosure obligations to
 16 require disclosure of “the facts, data, or other information relied on by the witness in forming
 17 them.” For the purpose of defining their discovery obligations in this litigation, the parties agree
 18 that Rule 26(b)(4)(C)(ii) shall be treated as if it reads: “identify facts or data that the party’s
 19 attorney provided and that the expert relied on in forming the opinions to be expressed.” The
 20 parties also agree that Rule 26(a)(2)(B)(vi) shall be treated as if it reads: “a statement of the
 21 compensation to be paid for the study and testimony in the case, including the hourly rate to be
 22 paid for the testifying expert’s time in the case.”

23 4. Subject to the limitations of Rule 26(b)(4)(C), as modified by Paragraph 3 above
 24 or the provisions of this paragraph below, the following types of information shall not be the
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26 ¹ This Stipulation and Order Concerning Expert Discovery shall govern the parties in the
 27 above-captioned action, whether they currently are involved or become so in the future, and in
 28 any related actions that may later be consolidated with this case.

1 subject of any form of discovery and the parties shall not be obligated to preserve such information
 2 in any form or include such information on any privilege log:

- 3 a. all written or oral communications in connection with this matter among
 4 and between the testifying expert and consultants, counsel, other experts,
 5 and/or staff or among any of these actors in connection with this matter,
 6 including, but not limited to:
 - 7 i. counsel and counsel's staff and the testifying expert and/or the
 8 expert's staff and/or supporting firms;
 - 9 ii. counsel and counsel's staff and any non-testifying expert consultant
 10 and/or the consultant's staff;
 - 11 iii. the expert and other experts and/or other non-testifying expert
 12 consultants;
 - 13 iv. experts and their staff and/or supporting firms;
 - 14 v. non-testifying expert consultants and their staffs; and/or
 - 15 vi. the respective staffs and/or supporting firms of testifying experts or
 16 non-testifying expert consultants and the staffs and/or supporting
 17 firms of other experts or non-testifying expert consultants;
- 18 b. all written or oral communications relating to the deposition of the testifying
 19 expert;
- 20 c. all work performed by non-testifying consultants;
- 21 d. all written or oral communications or other materials relating to interviews
 22 of or the potential retention of experts or consultants;
- 23 e. drafts of (i) final reports, (ii) written testimony, (iii) affidavits, (iv)
 24 declarations, or (v) other written materials prepared in connection with this
 25 matter;
- 26 f. preliminary or intermediate calculations, computations, or other data runs,
 27 or other types of preliminary work created by, for, or at the direction of a
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1 testifying expert by consultants, counsel, other experts, and/or staff, unless
2 they are relied upon by the expert to formulate his or her opinions;

3 g. any notes, analyses, comments, or other writings taken or prepared by or for
4 a testifying expert in connection with this matter unless they are relied upon
5 by the expert to formulate his or her opinions; and

6 h. budgets, invoices, bills, receipts, or time records concerning testifying or
7 non-testifying expert witnesses or consultants, their staff, assistants,
8 colleagues, or associates, or their companies or organizations, except an
9 expert may be asked reasonable questions regarding the compensation of
10 the expert and his or her staff, the amount of time an expert or that expert's
11 staff has spent on the expert's report and associated work, and the amount
12 of money billed for the report and associated work.

13 5. The limitations contained in Paragraph 4 shall not apply to any communications,
14 documents, data sets, data runs, calculations, computations, or other forms of information or work
15 upon which a testifying expert relies as a basis for any of his or her opinions whether expressed in
16 reports, affidavits, declarations, or testimony. Rules 26(a)(2)(B) and 26(b)(4), as modified by
17 paragraphs 3 above and 6 and 7 below, govern disclosure of those materials.

18 6. Except as set forth in Paragraph 4, in addition to what is required by Federal Rule
19 of Civil Procedure 26, for each testifying expert designated by the parties, the designating party
20 will, within two (2) business days of serving an expert report, affidavit, or declaration pursuant to
21 Rule 26(a)(2)(B) or otherwise, produce:

22 a. copies of the data, materials, and/or other information relied upon by the
23 testifying expert in forming the expert witness's opinions, including all raw
24 and final electronic data sets and electronic data compilations in the form or
25 format used for the expert's calculations; provided, however, that materials
26 produced previously in this action (except for the raw data sets) need not be
27 re-produced, but may be identified by Bates number, and that materials
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publicly available without charge online need not be produced, but may be identified by website, title, and date or a working URL;

- b. the input, programs, and output underlying all calculations relied upon in forming the testifying expert's opinions and/or needed to replicate or reproduce the expert's disclosed tables, figures, calculations, and reported results, including underlying raw and final data, spreadsheets, computerized regression analysis, and/or other underlying reports and schedules sufficient to reconstruct the work, calculations, and/or analyses upon which the expert witness is relying for his or her opinions; and
- c. any information (including, but not limited to, analyses, spreadsheets, graphs, and charts) relied upon by the testifying expert that is based on the output from any computer programs that are produced.

7. The information required by Paragraph 6 above to be produced shall be produced electronically (via email, disc or FTP site) where reasonably feasible. Data, statistical analyses, or other information (including any calculation or exhibit) upon which an expert relies for any of his or her opinion(s) in this matter shall be provided in widely available machine readable format, including any data that has been cleaned, reformatted, or modified in any way from the form in which it may have been provided to the expert. All other documents, data, and other information relied upon shall be provided in a format as agreed to by the parties, along with any software and instructions required to read them, but no party need produce computer software or instructions that are reasonably and commercially available (e.g., Microsoft Word, Excel, STATA, SAS). Documents that are publicly available without charge shall be identified by internet addresses where the materials can be accessed or obtained. Documents that have previously been produced during discovery need not be produced if they are identified by Bates number.

8. This stipulation is not intended to limit the ability of any party to prepare and use demonstrative exhibits, including demonstrative exhibits that may relate to an expert's testimony, during the course of any hearing or trial. The admissibility of any such demonstrative exhibits shall

1 be subject to the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and this Court's
2 Local Rules, unless otherwise provided by order of the Court.

3 9. No subpoenas (for depositions or documents) need be served on any testifying
4 expert from whom a report, affidavit, or declaration is provided. Instead, the party proffering such
5 expert will (a) be responsible for producing all materials and information relied on by the expert
6 as outlined above, and (b) make the expert available for deposition at a time mutually agreed to by
7 the parties and consistent with the Court's scheduling orders.

8 10. Nothing in this Stipulation shall permit a party or a testifying expert to withhold
9 any proposition, fact, belief, or other data, information, or material on which the expert relies in
10 support of her or his opinion(s) in this matter, or to prevent substantive deposition questions with
11 respect to any data or other non-privileged information that may be relevant to the substance of
12 the testifying expert's opinions, including, but not limited to: (i) theories, methodologies,
13 yardsticks, benchmarks, variables, data, facts, or assumptions that the expert relied on in forming
14 his or her opinions; (ii) the assumptions or facts, if any, that the party's attorney provided and that
15 the expert relied on in forming the opinions expressed; or (iii) any other assumptions that the expert
16 may have relied upon in preparing his or her report. However, such questions may not specifically
17 concern the wording or contents of any drafts of the expert's reports, affidavits, declarations,
18 written testimony, or other written materials on which the expert did not rely in forming his or her
19 expressed opinions.

20 11. The parties agree to comply with this Stipulation pending the Court's approval.
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1 Dated: September 19, 2022

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*Attorneys for Defendant Valve
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1 It is so ORDERED this 19th day of September 2022.

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5 John C. Coughenour
6 UNITED STATES DISTRICT JUDGE
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